

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

NO. 77-4217

UNITED STATES COURT of APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

OWNERS MAINTENANCE CORP.,

Respondent.

Bp/s

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

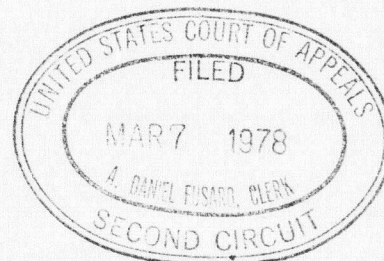
BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

WILLIAM R. STEWART,

Attorney,

National Labor Relations Board.
Washington, D. C. 20570

JOHN S. IRVING,
General Counsel,
JOHN E. HIGGINS, JR.,
Deputy General Counsel,
CARL L. TAYLOR,
Associate General Counsel,
ELLIOTT MOORE,
Deputy Associate General Counsel,
National Labor Relations Board.



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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by discharging and refusing to reinstate Thomas Soto and James Veve for engaging in union and concerted activity protected by Section 7 of the Act.

2. Whether the Board properly declined to defer to an arbitrator's award holding that, although Soto and Veve had been discharged without just cause, they had not been discharged in violation of Section 8(a)(3) of the Act and had forfeited their right to reinstatement and backpay by distributing leaflets in support of their grievance.

STATEMENT OF THE CASE

This case is before the Court upon the application of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. Sec. 151, et seq.), for enforcement of its order (A. 215-216)^{1/} issued against Owners Maintenance Corp. (hereinafter "the Company") on September 19, 1977, and reported at 232 NLRB No. 23. This Court has jurisdiction, the unfair labor practices having occurred at New York, New York.

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that the Company violated Section 8(a)(3) and (1) of the Act by discharging Thomas Soto and James Veve because of their union and concerted activities and by subsequently refusing to reinstate them because they distributed leaflets in support of their grievance. The Board also concluded that an arbitrator's award holding to the contrary was repugnant to the Act. The Board's findings are based upon the following record evidence:

A. Background

The Company, a subsidiary of Helmsley-Spear, Inc., is a New York corporation which provides cleaning, maintenance, and related services at numerous sites, including, at all relevant times, a commercial building located at 1 Penn Plaza in Manhattan (A. 197; 63). As a member

^{1/} Record references are to the appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

of the Realty Advisory Board, a multiemployer bargaining association, the Company is party to a collective bargaining agreement with Local 32 B, Service Employees International Union (hereinafter "the Union") (A. 197).

Thomas Soto was employed by the Company as a porter at 1 Penn Plaza from early May 1973 until his discharge July 3, 1975 (A. 6). During this time, at least four Company supervisors praised the quality of his work. In fact, only a month after Soto was hired, Supervisor McMannus called Soto into his office, told Soto he considered him to be "a very good worker" who had a "good work relationship with the other men," and offered Soto "the job of job leader which was a position like that of acting foreman." (A. 10-11; 14.) Upon accepting this offer, Soto was granted a \$10 wage incentive, carried a "beeper," and was entrusted with keys to Supervisors McMannus' and LeClaire's offices. Soto held the job of "job leader" until May 1974 when he "became the bathroom man." (A. 14-15.)

James ("Jaime") Veve, recommended by Soto, was hired by the Company in January 1974 and began working in a building the Company serviced at 200 Fifth Avenue (A. 67-68). In February 1974, Veve was transferred to 1 Penn Plaza where he worked as a porter until his discharge on July 3, 1975 (A. 68).

Both Soto and Veve filled out job application forms within about a week after they had actually begun working (A. 10, 73-74). Both employees answered "no" to the question on the form, "Have you ever been arrested? (except for traffic violations)" (A. 8, 70). In fact, both had been arrested

previously. Soto had been arrested during labor picketing at Nathan's Restaurant, for which he paid a \$25 fine, and had received a summons for trespassing while participating in a Viet Nam veterans' demonstration. Further, in 1967, Soto had been arrested and charged with marijuana possession along with everyone on the premises when police raided an apartment he was visiting, but the charge against Soto was dropped. (A. 8-10.) Veve had been arrested while also picketing Nathan's and had been arrested for parading without a permit during an antiwar demonstration in Washington, D.C. He pleaded guilty to a \$10 traffic violation on the latter occasion. (A. 70-72.)

- B. Soto and Veve Inform Employees of Their Contractual Rights and Union Remedies, Press Grievances Against the Company, and Assist Nonunit Employees in Grievance and Collective Bargaining Matters; Soto is Elected Shop Steward

Both Soto and Veve joined the Union within a short time after their employment (A. 15, 74-75). As many of their fellow employees--particularly the spanish-speaking workers--had never been to the union hall or spoken to the union delegate, had never seen the collective bargaining agreement, and did not know of their rights under its terms, Soto and Veve read and explained the contract to them and assisted them in bringing grievances to the attention of the Union (A. 31, 32, 76, 121-122, 115-116). During their lunch hours, Soto and Veve organized groups of employees to go to the union hall after work, and, when necessary, they served as interpreters (A. 29-30, 92). "So when there was trouble, people would naturally come to Mr. Veve and [Soto] and ask [Veeve and

Soto] to accompany them to the union to make a charge" (A. 31). From the time Veve was hired, he became Soto's closest collaborator (A. 35).

In addition to helping employees obtain the aid of their Union, Soto presented and supported employee grievances against the Company. From July 1973 until May 1974, for example, Soto complained verbally and in writing to Personnel Director Phil Cimusz, with whom he had almost daily contact, that the Company discriminated against blacks in assigning work and hired management's friends or relatives in preference to union members. (A. 37, 41-42, 43-44, 140-142.)^{2/} When the Company fired Shop Steward Calabrese in June 1974, Soto and Veve called a lunchtime meeting of day crew porters in the locker room, where it was decided that the porters would all write letters to be submitted at Calabrese's hearing before the contract arbitrator (A. 19, 20-21, 78-79). Soto further organized the unit employees and as a result they appeared at the hearing, made themselves available to testify, and were heard by the arbitrator (A. 21). At the hearing, Soto testified and submitted the porters' letters to the arbitrator in the presence of management officials. The arbitrator ordered that Calabrese be reinstated with full seniority. (A. 21-22.)

Two or three weeks after Calabrese's discharge, the Company suddenly terminated the employees' authorized coffee breaks (A. 23-24, 54). Again, Soto and Veve called a lunchtime meeting of the porters and it was decided that Soto would present a grievance on behalf of the unit

^{2/} In response Soto was told that "the hiring practices . . . were not [Soto's] concern" and that "[t]hat is not why [Soto] was made job leader" (A. 42).

employees, alleging retaliatory withdrawal of a previously enjoyed benefit (A. 25, 27). Subsequently, the porters met and decided to write letters to be introduced in the grievance proceeding. At the hearing, in the presence of management personnel, Soto argued in support of the grievance and submitted the letters in evidence. (A. 25-26, 80-81.)

In the three months preceding their discharges, Soto and Veve extended their activities to aid non-unit employees of the Company as well as their fellow porters. For example, as the building matrons had no shop steward, Soto and Veve helped employee Teresa DeSalvatore bring a grievance over reduction in working hours and organized the porters to write a letter supporting her grievance. In addition, Soto took her grievance to Supervisor LeClaire and protested the lower pay given to matrons doing the same work as porters. (A. 34, 44-45, 56, 81-85, 136-138.) From April 1975 until their discharges, Soto and Veve also assisted guards in bringing successful grievances against the Company (A. 27-30, 34, 55, 115-116). Moreover, when the guards' contract expired, the union delegate asked Soto to obtain contract demands from the guards for use in negotiations with the Company (A. 32). Accordingly, Soto and Veve held a meeting with the guards, collected their suggestions, and compiled a four-page statement of demands which all the guards signed (A. 33-34, 86-88, 110-111, 158-159) At the bargaining session where these demands were presented to Company President James Early, Security Director Mauro Constrastano remarked that Soto was the "back door lawyer" behind the guards' contract negotiations (A. 159-161, 181).

In May 1975, Soto was formally elected shop steward at a lunchtime meeting of porters in the locker room, in the presence of Supervisor Timmons (A. 16). It became "common knowledge" that Soto was shop steward (A. 149-150). At about the time that Soto was elected shop steward, the Company initiated the investigation of Soto and Veve described infra, pp. 8-10. During the month preceding their discharges, Soto and Veve continued and intensified their activity on behalf of the employees. Before he went on vacation in June 1975, Soto brought a grievance to Supervisor LeClaire on behalf of Calabrese, claiming that LeClaire was violating the seniority provisions of the contract by denying Calabrese the job of freight elevator operator (A. 35-36). That same month, Supervisor Timmons came to Soto with a potential grievance concerning his foreman's pay under the contract, and Soto accompanied him to the Union to discuss the matter with the Union delegate (A. 50). Approximately two weeks before his discharge, Veve brought a grievance to LeClaire on behalf of employee Carlos Rivera to protest the "petty harassment" of Rivera, including the withholding of his paycheck. When LeClaire asked Veve "what business was it of [his]" and told him he "should mind [his] own business," Veve answered that "it was a fellow union man that was being grieved" and further explained that he had been authorized by Soto to act as steward during the latter's absence. (A. 88-91)^{3/} Rivera received his paycheck after LeClaire consulted with Personnel Manager Cimusz (A. 90).

^{3/} Prior to going on vacation, Soto called a meeting, at which Supervisor Timmons was again present, and designated Veve to act as job steward in his [Soto's] absence (A. 36).

Finally, only a few days before Soto and Veve were discharged, Supervisor Timmons again sought Soto's aid when the Company ordered Timmons to break a strike of freight elevator operators by directing porters to run the freight elevators (A. 47-49, 61). Soto immediately notified the Union and, after meeting with the porters during lunch hour, informed the Company, through LeClaire, that the porters would not perform the work of the striking union. The Company made no further attempt to require porters to operate the elevators. (A. 48-49.)

C. Company Security Director Cuomo Begins Investigating Soto and Veve, Places Them Under Continual Surveillance, Obtains Unauthorized Arrest Data From a Source in the Police Department and Reports to the Company; Soto and Veve are Discharged

In May 1975, John Cuomo, a retired 20-year veteran of the New York Police force, succeeded Constrastano as director of security at 1 Penn Plaza (A. 125, 146). Shortly thereafter, Cuomo initiated an investigation of Soto and Veve, assertedly prompted by an anonymous phone call suggesting he "keep [his] eyes on" Soto and Veve because "perhaps they were committing acts of thievery in the building" and because "they were bad people--associated with bad groups" (A. 77, 129-131, 133, 151). Also, when Cuomo was first employed, "Mr. Viggiano pointed [Soto and Veve] out to [him] and said watch them. They were part of the people--a group of people [he] was told to keep [his] eyes on--Soto and Veve" (A. 148-149). Cuomo personally watched Soto and Veve on the job and assigned "several people" to watch them "from the time they punched in until they were leaving the building" (A. 132, 134).

Cuomo not only had Soto and Veve watched daily "in their prescribed duties," but, in addition, he personally visited and observed Soto's home address, a loft building on West 21st Street which he described as a "very suspicious building" (A. 137-138, 142-143).

Although Cuomo received daily reports on all their activities which he forwarded to his superior, Helmsley-Spear Building Manager Fernando Viggiano, the surveillance of Soto and Veve revealed nothing to justify any suspicion of misconduct on their part (A. 132-133, 138a, 139). However, Cuomo learned of "meetings that were going on" and concluded "that they were a pretty close knit group. Veve and Soto and their friends, and that they had to be watched out for--and to be especially careful to watch their activities" (A. 200; 136a, 139).

Subsequently, Cuomo requested and obtained a confidential report, known as a "yellow sheet," containing incomplete data regarding Soto's and Veve's arrest records, from a source in the New York Police Department, whose name Cuomo refused to disclose or could not remember (A. 77, 134-135)^{4/}. However, Cuomo did not approach Soto and Veve to discuss the information he had received or to verify its accuracy (A. 142, 144). On June 17, 1975, Cuomo sent Viggiano a written memorandum which, among other things, erroneously implicated Soto in the "sale

^{4/} When Cuomo was first asked to name the person who had given him the "yellow sheets," he stated that he was "not at liberty to divulge his name." Upon being ordered by the Administrative Law Judge to state the name of the person, Cuomo replied, "I really don't remember his name--to tell you the truth." (A. 135)

of heroin" and indicated that Soto and Veve had made misrepresentations on their application forms (A. 141, 143, 144).

Although Helmsley-Spear officials had never before become involved in transfers of the Company's maintenance employees working at 1 Penn Plaza, on June 18, Helmsley-Spear Property Manager Richard Isolini sent a memorandum to Company Vice President William Muller in which he referred to "the continuing problems" the Company had been having with Soto and Veve and requested that they be transferred from 1 Penn Plaza within three days (A. 164, 165-166, 239). Two weeks later, on July 3, 1975, Soto and Veve were discharged for "falsification of records," without prior warning and without further explanation (A. 198; 6-7, 40-41, 68-69).

D. Soto's and Veve's Leafleting Activity
in Support of Their Grievance

Shortly after they were discharged, Soto and Veve filed a grievance, alleging that they had been illegally discharged (A. 174). On July 9, 1975, Soto and Veve stood on the sidewalk directly in front of the entrance to 1 Penn Plaza and distributed a one-page leaflet they had written (A. 201; 38-39, 94-96). The leaflet reviewed their union activities and discharge, asserted that the stated ground for the discharges was a "pretext," and concluded that (A. 226):

The real reason that brothers Jaime Veve and Tommy Soto have been fired from the day shift of porters is because these workers have challenged the racist, discriminatory, anti-labor, anti-women practices in the building. Because they have dared to attempt to organize the workers in the building to stand up for their rights as humans.

The leaflet included Soto's home phone number because "[he] wanted [the workers] to call [and he] wanted to bring them forth as witnesses at the arbitration proceeding" (A. 38-39).

In early October, after the commencement of formal grievance proceedings, Soto and Veve again passed out a leaflet at 1 Penn Plaza, indicating that an arbitration hearing was scheduled for October 7, 1975 (A. 202; 96, 227-234). This four-page leaflet, written by Soto and Veve, also set forth in English and Spanish the facts concerning the grievance, related subsequent instances of threats to Company employees for attempting to support Soto and Veve in their grievance proceeding, and requested "fellow working people" to "please help Tommy Soto and Jaime Veve get their jobs back" (A. 202; 229). Examples of grievances brought by Union members against the Company were briefly summarized, with requests for and acknowledgements of employee "support." The leaflet further contained an open letter to the arbitrator from "over 20 members of Local 32 B--names withheld for fear of repression," which lauded Soto's and Veve's efforts to inform the employees of their rights. The Union's address and the name of its delegate were set out in a separate box, along with the statement, "Know your union, know your rights." (A. 202-203; 227-230). Soto also distributed this leaflet at 420 Lexington Avenue, where fellow employee Calabrese had been transferred, and Veve distributed the leaflet in front of the Helmsley-Spear offices on 42nd Street. (A. 62, 94-95).

Although Company President James Early did not personally witness the leafleting incidents, he assertedly decided to deny reinstatement to Soto and Veve on the basis of the reports he had received about such incidents and his own impression that (A. 176-178):

All hell broke loose. There were pamphlets distributed. There were parades around the building. They picketed the other buildings that had nothing to do with One Penn Plaza. It looked like they wanted trouble--so I was willing to give it to them.

E. The Arbitrator's Opinion and Award

On April 13, 1976, the contract arbitrator for the Real Estate Advisory Board rendered his opinion and award, finding that "the falsification of job applications by Soto and Veve did not constitute just cause for discharge" (A. 199; 253). The arbitrator further found (A. 199; 253):

There is a substantial amount of evidence on the record which indicates that the grievants may have, at least in part, been discharged for reasons other than the falsification of job applications. This evidence includes Cuomo's continued investigation of the grievants after several weeks of fruitless observation despite the questionable reliability of an anonymous tip that they had been involved in thefts in the building; the fact that the decision to discharge the grievants was made with no investigation beyond Cuomo's concededly incomplete and at least partially inaccurate report; and, Isolini's memorandum which stated that the grievants had been a "continuing problem" without any explanation as to what those problems were.

However, stating that the Company "may have had many other reasons for discharging the grievants which it chose not to air during this proceeding," the arbitrator concluded that the discharges were not "unlawful within the meaning of Section 8(a)(3) of the Labor Management Relations Act." (A. 253-254, 255). The arbitrator further found that both Soto and Veve had forfeited their right to reinstatement with backpay by their leafleting activities. Specifically, the arbitrator found that, under the authority of Emporium Capwell v. Western Addition Community Organization, 420 U.S. 50 (1975), Soto's and Veve's leafletting activity fell outside the protection of Section 7 of the Act and that this unprotected activity constituted "gross disloyalty toward the Company" which

justified denying Soto and Veve reinstatement to their jobs (A. 201; 256-259). Accordingly, the arbitrator awarded Soto and Veve backpay only from the date of their discharge to the date they began leafletting (A. 259).

II. THE BOARD'S CONCLUSIONS AND ORDER

On these facts, the Board found that the Company violated Section 8(a)(3) and (1) of the Act by discharging Soto and Veve because of their Union and concerted activities and by refusing to reinstate them because they engaged in leafletting activity protected by Section 7 of the Act (A. 204, 215-216). The Board refused to defer to those portions of the arbitrator's award holding to the contrary because it concluded that the award was repugnant to the policies and purposes of the Act (A. 200, 201).

The Board's order requires the Company to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights. Affirmatively, the Board's order requires the Company to offer immediate and full reinstatement to Thomas Soto and James Veve, to make them whole for loss of earnings suffered by reason of the discrimination against them, and to post the usual notices. (A. 205-208).

ARGUMENT

- I. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT BY DISCHARGING AND REFUSING TO REINSTATE SOTO AND VEEVE BECAUSE THEY ENGAGED IN UNION AND PROTECTED ACTIVITY, THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT
- A. Soto and Veeve Were Unlawfully Discharged Because of Their Union and Concerted Activities

After over two years and over a year and a half, respectively, of satisfactory employment with the Company, Thomas Soto and James Veeve were abruptly discharged, allegedly for making false statements on their job applications. The discharges of this known aggressive union activist and steward and his associate followed a period of expanding activity during which they vigorously supported the Union and enforced the collective bargaining agreement. Indeed, Soto and Veeve did not confine their efforts merely to organizing and informing their fellow porters, but, in the months preceding their discharge, had also begun to assist non-unit Company employees in grievances and collective bargaining.

As this Court has held, a discharge motivated by an employee's union activities violates Section 8(a)(3) and (1) of the Act.

N.L.R.B. v. George J. Roberts & Sons, Inc., 451 F. 2d 941, 945 (C.A. 2, 1971); N.L.R.B. v. Gladding Keystone Corp., 435 F. 2d 129, 131-132 (C.A. 2, 1970). The only question presented here is whether substantial evidence supports the Board's conclusion that the discharges of Soto and Veeve were motivated by their union activities. The Board may draw reasonable inferences from the surrounding circumstances in

determining whether unlawful considerations entered into the discharges.

As this Court explained in N.L.R.B. v. Long Island Airport Limousine Service, 468 F. 2d 292, 295 (1972):

Direct evidence may not be obtainable and circumstantial evidence and 'inferences of probability drawn from the totality of other facts', N.L.R.B. v. Park Edge Sheridan Meats, Inc., 341 F. 2d 725, 728 (C.A. 2, 1965), are perfectly proper.

See also N.L.R.B. v. Melrose Processing Co., 351 F. 2d 693, 698 (C.A. 8, 1965) ("Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence In analyzing the evidence, circumstantial or direct, the Board is free to draw any reasonable inference."). Moreover, as this Court has consistently stated, the Board's finding of unlawful motivation "cannot lightly be overturned on review." N.L.R.B. v. Gladding Keystone Corp., *supra*, 435 F. 2d at 131-132 (1970). Accord: United Aircraft Corp. v. N.L.R.B., 440 F. 2d 85, 91-92 (C.A. 2, 1971); N.L.R.B. v. Advanced Business Forms Corp., 474 F. 2d 457, 464 (C.A. 2, 1973). The Board's determination that a discharge was motivated by unlawful considerations must stand if supported by substantial evidence "even though the Court would justifiably have made a different choice had the matter been before it *de novo*." Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 488 (1951); N.L.R.B. v. Walton Mfg. Co., 369 U.S. 404, 405 (1962). As we show below, the record fully supports the Board's determination that Soto and Veve were discharged in violation of Section 8(a) (3) and (1) of the Act.^{5/}

^{5/} Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to interfere with, restrain, or coerce an employee in the exercise of rights protected by Section 7 of the Act. As this

Direct, uncontradicted evidence, as set forth supra, pp. 4-8, clearly establishes the Company's knowledge of Soto's and Veve's Union activities and of their status as spokesmen for their fellow employees. Thus, Soto and Veve openly brought grievances to Company representatives, wrote and signed their names to complaints and letters, testified against the Company in arbitration hearings, and made no secret of their growing involvement with employees outside the unit. The Company's hostility to Soto's and Veve's activities at 1 Penn Plaza, is revealed by the admonitions to these two employees to mind their own business, Constrastano's reference to Soto as the "back door lawyer" for the guards, Cuomo's unsubstantiated characterization of Soto and Veve as "troublemakers" (A. 77, 104),^{5/} Viggiano's unexplained and unjustified

^{5/} Court has held, activities involving attempts to enforce the provisions of a collective bargaining agreement, for example by complaining or grieving, are concerted activities protected by Section 7 of the Act. N.L.R.B. v. Interboro Contractors, Inc., 388 F. 2d 495, 500 (C.A. 2, 1967); N.L.R.B. v. John Langenbacher, 398 F. 2d 459, 463 (C.A. 2, 1968), cert. denied, 393 U.S. 1049. Thus, the Company violated Section 8(a)(1) as well as 8(a)(3) of the Act if the discharges of Soto and Veve were motivated by the exercise of their Section 7 rights to support the Union, enforce the collective bargaining agreement, and present and support employee grievances. N.L.R.B. v. Lasaponara & Sons, Inc., 541 F. 2d 992, 998 (C.A. 2, 1976), cert. denied, 430 U.S. 914.

^{6/} See N.L.R.B. v. Lasaponara & Sons, Inc., supra, 541 F. 2d at 997 (employer called union steward a "troublemaker"); N.L.R.B. v. Louisiana Mfg. Co., 374 F. 2d 696, 703-704 (C.A. 8, 1967) (dischargee called "troublemaker"); N.L.R.B. v. Peerless Products, Inc., (264 F. 2d 796, 772 (C.A. 7, 1959) ("troublemaker").

designation of Soto and Veve as employees to be watched, and Isolini's memorandum of June 18, 1975, referring to them as "continuing problems,"^{7/} On this evidence, the Board reasonably inferred that the Company's motivation in discharging Soto and Veve was discriminatory.

The Board's inference of unlawful motivation is sustained and buttressed by the fact that the Company's only explanation for the discharges fails to withstand scrutiny. N.L.R.B. v. Griggs Equipment, Inc., 307 F. 2d 275, 278 (C.A. 5, 1962). Soto and Veve were plainly discharged "without just cause," as the arbitrator found. Although the fact that the discharges were unwarranted does not necessarily mean that the Company's asserted grounds were pretextual, when "the reasons advanced are not persuasive the [protected] activity may well disclose the real motive behind the employer's actions." N.L.R.B. v. Melrose Processing Co., *supra*, 351 F. 2d at 699 (C.A. 8, 1965). In the face of substantial evidence that Soto and Veve had been discharged for reasons other than the misrepresentations, the Company, however, merely adhered to its discredited ground, specifically informing the Administrative Law Judge, "Your Honor, we have no other reason." (A. 184-185).

^{7/} Although Isolini testified (A. 167a) that "continuing problems" referred to the false statements on the job applications, this matter had only been brought to the attention of the Company the day before the memorandum was written (A. 167a) and could not in any event be characterized as "continuing problems." The only "problems" Soto and Veve ever caused the Company were their union activities. Thus, whereas the Company ordinarily experienced only two or three grievance arbitrations annually in all its buildings combined, Soto's and Veve's activities produced an equivalent or greater number of formal arbitrations at 1 Penn Plaza alone, in addition to numerous grievances resolved short of arbitration (A. 179-180).

Thus, the Company offered no explanation for its hostility to Soto and Veve and no legitimate business justification for their discharges to counter the inference of unlawful motivation warranted by the facts in this case.

Moreover, the manner in which the Company conducted the investigation of Soto and Veve--together with the conflicting and improbable explanations given for singling out these two individuals--tends to negate any claim that the Company in good faith discharged Soto and Veve for the reason it claims. As noted supra, Cuomo first stated that he began his surveillance of Soto and Veve because an anonymous phone call accused them--falsely, as he discovered--of stealing from the building. However, Cuomo also admitted that, even before he received the anonymous phone call, Viggiano had pointed out Soto and Veve as suspicious employees he should keep his eye on. As the record contains no evidence of any troublesome conduct other than Soto's and Veve's union activities, Viggiano's warning was as baseless as the anonymous tip and further supports the Board's inference of unlawful motivation. Nonetheless, Cuomo pursued his fruitless investigation even after continual, daily surveillance produced nothing to substantiate the accusations of theft and indeed revealed not a single instance of any on-the-job misconduct to justify disciplining Soto or Veve.

Further, the Company would not be insulated from a finding of unlawful motivation even if, as was not the case here, its investigation had eventually produced just cause to discharge these employees. For,

as this Court explained in United Aircraft Co. v. N.L.R.B., supra (440 F. 2d at 92) (rejecting the employer's claim it had discharged Union stewards solely on the basis of security investigators' reports finding cause for discharge):

First, in many instances the investigative files themselves clearly showed that the statements obtained were sharply conflicting or the case for discharging otherwise doubtful. Surely the [employer] cannot claim immunity for discharges in those instances, and its alleged good faith therefore is questionable. Second, in light of the many instances where internal security investigators went out of their way to find grounds for discharging stewards, even to the point of falsifying statements, it defies credibility to argue that the investigators were doing this without the knowledge and sanction of upper echelon [employer] officials. In fact, the record reveals numerous instances of investigations being initiated or supervised by the personnel department.

See also N.L.R.B. v. Advanced Business Forms, supra, 474 F. 2d at 465 (Board's inference justified by evidence indicating "the Company intended to watch [the employee's] work extra-carefully in order to find a pretext on which to discharge her").

Finally, the abruptness and timing of the unwarranted discharges following Soto's election as Union steward, Soto's and Veve's efforts on behalf of the guards and the matrons, and a month of grievance activity culminating in the porters' concerted refusal to break another union's strike at 1 Penn Plaza, provide additional persuasive evidence of the Company's illegal motivation. N.L.R.B. v. Long Island Airport Limousine Service, supra, 468 F. 2d at 295; N.L.R.B. v. Advanced Business Forms Corp., supra, 474 F. 2d at 46. On all the foregoing facts, the Board properly

found that Soto and Veve were discharged because of their union and concerted activities, in violation of Section 8(a)(3) and (1) of the Act.

B. Soto and Veve Were Unlawfully Denied
Reinstatement for Engaging in Leaflet-
ing Activity Protected by Section 7
of the Act

Section 7 of the Act guarantees to employees "the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of . . . mutual aid or protection." Section 8(a)(1) of the Act implements this guarantee by making it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7." The "concerted activities" protected by Section 7 are broadly construed to embrace individual efforts to initiate collective activity or to vindicate contractual rights by complaining or grieving. See Owens-Corning Fiberglass Corp. v. N.L.R.B., 407 F. 2d 1357, 1365 (C.A. 4, 1969) ("The activity of a single employee in enlisting the support of his fellow employees is as much concerted activity as is ordinary group activity. The one seldom exists without the other."); N.L.R.B. v. Interboro Contractors, Inc., *supra*, 388 F. 2d at 499-500. An employee who attempts to press a complaint through the union's grievance machinery and enlist employee support for that grievance clearly engages in union and "concerted activities" protected by Section 7. Dreis & Krump Mfg. Co. v. N.L.R.B., 544 F. 2d 320, 326-329 (C.A. 7, 1976); Hugh H. Wilson Corp. v. N.L.R.B., 414 F. 2d 1345, 1347 (C.A. 3, 1969), cert. denied, 397 U.S. 935; N.L.R.B. v. Lenkurt Electric Company, 459 F. 2d 635, 637-638 (C.A. 9, 1972).

Before the Board, the Company contended that Soto and Veve were not entitled to reinstatement because of the leaflets they distributed in support of their discharge grievance. Therefore, the only issue before this Court with respect to this matter is whether the Board properly found such distribution to be activity protected by Section 7 of the Act. We submit that the record evidence amply supports the Board's conclusion.

By distributing leaflets, Soto and Veve sought to organize and obtain the same concerted employee support for their grievance which had proved successful in the prior contractual grievance proceedings, described supra, pp. 4-7. As Soto testified (A. 38):

I had been fired on the July 4th weekend. It had been kept from the workers. I was trying to enlist their support in the arbitration proceeding. I wanted them to call. I wanted them to obtain this telephone number. I wanted to bring them forth as witnesses at the arbitration proceeding.

The July leafleting in fact furthered Soto's lawful purpose. Thus, Company employees began to organize support for Soto and Veve, circulated a letter petition, and continued to maintain contact with them as they prepared for arbitration;^{8/} Further, the letter was introduced in Soto's

^{8/} Company officials were fully aware of these activities and sought to dissuade employees from backing Soto and Veve. For example, when Constrastano observed guard Allan Strauss signing the petition on behalf of Soto and Veve, he asked him, "Do you know that Mr. Soto is a known drug dealer?" Further, after watching Strauss confer with James Minniefield, a porter known as Soto's and Veve's contact with the employees, Constrastano warned Strauss, "Mr. Cuomo is watching you, and you better stay away from [Minniefield]. He is nothing but a commie liberal." (A. 112-113.) Another guard, Florancio Garay, was asked by Cuomo if he had talked to Soto or signed anything; when

and Veve's arbitration proceeding, and about half of the employees who signed it eventually appeared to testify at the hearings (A. 108, 109, 243). The October leafletting was directed to the same protected end and was plainly justified in light of the intervening warnings to Company employees and the lapse of time between the discharges and the scheduled October hearing date. On these facts, the Board properly found that Soto and Veve engaged in concerted activities for the purpose of mutual aid and protection under Section 7 of the Act.

There is no merit to the Company's contention before the Board that Soto and Veve forfeited their Section 7 protection under the authority of Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975). In that case, minority employees repudiated the contractual grievance mechanism which had been invoked by their union and sought instead to compel their employer to bargain separately with them by exerting economic pressure. This conduct was found to undermine the principle of exclusive representation embodied in the Act. Soto and Veve, in contrast, sought not to undermine or repudiate the contractual grievance mechanism but rather to make the most effective use of the established

8/ (footnote cont'd)

Garay admitted he had been talking with Soto and had signed a paper, Cuomo told Garay he could "lose [his] job" or "get laid off." (A. 118-119). Employee Andre Correa was given a pink slip for absence the day he testified at one of Soto's and Veve's hearings (A. 145, 156). When porter Carlos Rivera showed up to testify at Soto's and Veve's hearing, Personnel Director Cimusz "told [him] to stay away from Tommy Soto and this case" and offered him a job in another building in exchange for not testifying at the hearing (A. 123-124).

grievance mechanism, as they had successfully done in the past. And, as the court explained in Dreis & Krump Mfg. Co., Inc. v. N.L.R.B., supra, 544 F. 2d at 326:

An employee, on the basis of existing authority, can be charged with contravention of an established grievance procedure only where he deliberately spurns Union auspices and instead attempts to directly initiate negotiations with his employer regarding working conditions.

See also N.L.R.B. v. Lasaponara & Sons, Inc., supra, 541 F. 2d at 998 (C.A. 2, 1976); Moore v. Sunbeam Corp., 459 F. 2d 811 (C.A. 7, 1972).

Moreover, the stated goal of the leaflets was, not separate bargaining with the Company, but rather the vindication of employee rights through the Union and the grievance procedure. For example, the second leaflet informed "fellow working people" of successful grievances by union members and deplored the Company's own efforts to undermine the established mechanism by intimidating its employees. Also, as the Administrative Law Judge stated (A. 204), "the Union's address was furnished to workers for their enlightenment. Indeed, the leaflet enhanced the Union's role as the bargaining agent."

Equally without merit is the Company's contention, citing N.L.R.B. v. Local Union No. 1229, International Brotherhood of Electrical Workers (Jefferson Standard Broadcasting Company), 346 U.S. 464 (1953), that the leafleting constituted "gross disloyalty" and, therefore, justified denial of reinstatement to Soto and Veve. As the leaflets related directly to a legitimate grievance and clearly disclosed the nature of the pending labor dispute, Soto and Veve did not, by distributing such leaflets,

forfeit their Section 7 protection.^{9/} See Community Hospital of Roanoke Valley, Inc. v. N.L.R.B., 538 F. 2d 607, 610 (C.A. 4, 1976) (nurse's activity protected, not disloyal, though she appeared on television news broadcast, expressed dissatisfaction with hospital policies, and stated that hospital was understaffed).

Moreover, an employee's conduct and communications in the course of otherwise protected activity do not lose their protection unless shown by the employer to be "indefensible" or "a deliberate or reckless untruth" (Linn v. United Plant Guard Workers of America, Local 114, 383 U.S. 53, 61, 63 (1966)), "recklessly malicious, insubordinate or unrelated to his protected activity" (N.L.R.B. v. Cement Transport, Inc., 490 F. 2d 1024, 1029-1030 (C.A. 6, 1974)), or "so violent or of such serious character as to render the employee unfit for further service" (Dreis & Krump Mfg. Co. v. N.L.R.B., supra, 544 F. 2d at 329). Here, in light of the Company's failure to show that the distribution of the leaflets had any of the above characteristics, the Board properly found that the employees' distribution of the leaflets constituted protected activity under Section 7 of the Act.^{10/}

^{9/} As the Company sells no products or services consumed by the public at large, the suggestion that Soto and Veve were attempting to bring economic pressure on the Company by damaging its ability to do business has no merit.

^{10/} The Board found that "on the basis of the credible evidence," it could not "find that the facts and assertions related in the . . . leaflets are untrue" (A. 203) and that "what was published has not been shown to have strayed from the truth nor been proved to have been deliberately or maliciously false" (A. 204; 96-99, 102-105, 106-107).

II. THE BOARD PROPERLY DECLINED TO DEFER
TO THE ARBITRATOR'S AWARD

Section 10(a) of the Act provides that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . ," and it is well settled that the presence of an arbitration award does not oust the Board of jurisdiction to adjudicate unfair labor practices involving the same subject matter. N.L.R.B. v. Strong Roofing and Insulating Company, 393 U.S. 357, 360-361 (1969); N.L.R.B. v. Horn & Hardart Co., 439 F. 2d 674, 678 (C.A. 2, 1971). As the Supreme Court has stated: "The superior authority of the Board may be invoked at any time." Carey v. Westinghouse Electric Corp., 375 U.S. 261, 272 (1964).

However, in order to further the settlement of disputes through arbitration, the Board has voluntarily deferred to arbitration awards in cases where the award has resolved the specific pending unfair labor practice issues, the arbitration proceedings appear to have been fair and regular, all parties have agreed to be bound by the award, and the result is not clearly repugnant to the policies and purposes of the Act. See Spielberg Manufacturing Company, 112 NLRB 1080 (1955). The Supreme Court has twice indicated approval of the Board's limited, voluntary deferral policy. Carey v. Westinghouse Electric Corp., supra, 375 U.S. at 270-272; Arnold Company v. Carpenters District Council, 417 U.S. 12, 16-17 (1974). Nonetheless, the Board is not "automatically" required "to defer to the primary determination of an arbitrator." N.L.R.B.

v. Acme Industrial Co., 385 U.S. 432, 437 (1967). Accord: N.L.R.B. v. Horn & Hardart Co., supra, 439 F. 2d at 678. Should the Board disagree with the arbitrator, "the Board's ruling would, of course, take precedence." Carey v. Westinghouse Electric Corp., supra, 375 U.S. at 272. The decision not to accept the arbitrator's award lies within the Board's discretion and, as this Court has stated, "its discretion in this respect must be regarded as large." N.L.R.B. v. Horn & Hardart Co., supra, 439 F. 2d at 679.

Under the foregoing authority, the Board properly exercised its discretion in declining to defer to the arbitrator's speculation that the "Company may have had many other reasons for discharging the grievants which it chose not to air during [the arbitration] proceeding" and correctly ruled that Soto and Veve had been discharged in violation of Section 8(a)(3) and (1) of the Act.^{13/} As the court noted in Dreis & Krump Mfg. Co. v. N.L.R.B., supra, 544 F. 2d at 330, the Board has an "independent duty . . . to refuse deferral to an arbitral award wholly incompatible with labor policy because it condones an unfair labor practice." Here, as we have shown above, since the record supports the Board's Section 8(a)(3) finding, "the Board was clearly warranted in rejecting an arbitral award which condoned an unfair labor practice as repugnant to the purposes of the Act." Dreis & Krump Mfg. Co. v. N.L.R.B., supra.

^{13/} The correctness of the Board's refusal to defer to the arbitrator's speculation in this case is shown by Company counsel's statement to the Administrative law Judge at the unfair labor practice hearing that the Company had "no other reason" for discharging Soto and Veve (A. 185).

Moreover, in this case, the Board did not substitute its fact finding for that of the arbitrator, but rather, in its sound discretion, refused to be bound by an arbitrator's conclusions of law which were contrary to the weight of the evidence. Thus, the arbitrator found substantial evidence that the Company was aware of the employees' union activities, was for some unexplained reason hostile to Soto and Veve, had discharged Soto and Veve without just cause, and had some other unstated reason in addition to its stated ground for discharging them. Nevertheless, he failed to draw the logical inference from these factual findings--that the employees were discharged because of their union and protected activities--because "[a]side from Soto's discharge, . . . the Union failed to develop one significant incident of discrimination against him." (A. 255, emphasis added.) In these circumstances, the Board properly found the arbitrator's Section 8(a)(3) finding to be repugnant to the purposes and policies of the Act.

The Board further properly declined to defer to the arbitrator's legal conclusion that Soto's and Veve's leafleting was not protected concerted activity. As we have shown, supra, pp. 21-24, Soto and Veve plainly were engaged in conduct protected by Section 7 of the Act. The arbitrator's contrary conclusion, therefore, is clearly repugnant to the policies and purposes of the Act because it contravenes both the employees' statutory "fundamental right" (N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937)) to engage in concerted activities

for mutual aid and protection, and the court-approved principle affording wide latitude to even harsh or offensive statements made in the course of such protected activities (Dreis & Krump Mfg. Co. v. N.L.R.B., supra, 544 F. 2d at 329). Furthermore, the arbitrator's award, while agreeing that Soto and Veve had been discharged without just cause in violation of their contractual rights, penalizes Soto and Veve for attempting to vindicate their rights through effective use of the established grievance mechanism. Thus, the arbitrator's award is clearly repugnant to the policies and purposes of the Act.

CONCLUSION

For the foregoing reasons, we respectfully submit that a judgment should enter enforcing the Board's order in full.

WILLIAM R. STEWART,

Attorney,

National Labor Relations Board.
Washington, D.C. 20570

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

ELLIOTT MOORE,
Deputy Associate General Counsel,
National Labor Relations Board.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

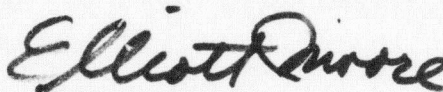
NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 77-4217
	)	
OWNER MAINTENANCE CORP.,	)	
	)	
Respondent.	)	
	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's brief in the above captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

James Berg, Esquire
Realty Advisory Board
292 Madison Avenue
New York, New York 10017

James Carmichael, Esquire
Proskauer, Rose, Goetz &
Mendelsohn
300 Park Avenue
New York, New York 10022



Elliott Moore

Elliott Moore

Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.

this 23rd day of February, 1978